

THE INTRICACIES OF TAX AND GLOBALIZATION

Sagit Leviner*

Reviewing: Global Perspectives on Income Taxation Law by Reuven S. Avi-Yonah,
Nicola Sartori, & Omri Marian (Oxford, 2011)

Abstract

The Intricacies of Tax & Globalization review explores the effect of globalization on taxation. It looks into the available data (particularly from the OECD and EU) to explore global trends in taxation over the past three decades to evaluate whether and to what extent globalization leads to convergence or divergence of national tax policies, and to assess the merit of such changes.

* Sagit Leviner is an associate professor of law at SUNY Buffalo Law School and an overseas affiliated Faculty with Ono Academic College Faculty of Law in Israel. The author is thankful for the insightful contribution of Eric Toder to this review. Valuable comments on and discussions of earlier versions of this review were also offered by Yariv Brauner, Tsilly Dagan, David Gliksberg, Victor Fleischer, Diane Ring, Kirk Stark, Nancy Staudt and the participants of the Interdisciplinary Center Faculty of Law International Tax Symposium, Herzliya, Israel (April 2013), the Hebrew University Faculty of Law Tax Colloquium, Jerusalem, Israel (January 2013), the 6th Annual Joint Conference of Columbia University Law School and Ono Academic College, Kiryat Ono, Israel, (June 2012), and the International Society for New Institutional Economics Annual Conference, USC Gould School of Law, Los Angeles, CA (June 2012). SUNY Buffalo law student Vanessa Glushefski provided excellent research assistance.

I. INTRODUCTION.....	209
II. GLOBALIZATION AND TAXATION LAW: THE EMERGENCE OF A CLOSER-KNIT WORLD.....	211
III. AVOIDING THE STRAINS OF GLOBALIZATION – COOPERATION, HARMONIZATION AND OTHER TAX RELATED INITIATIVES	219
IV. TRENDS OF CONVERGENCE AND DIVERGENCE IN AN INTERDEPENDENT WORLD	223

I. INTRODUCTION

"[T]he comparative study of tax law is not strictly theoretically oriented . . . rather it is a study of what may indeed become a reality in the foreseeable future"¹

The field of taxation is often criticized for being technical in nature and lacking a broad contextual perspective.² With their expansive comparative analysis, Avi-Yonah, Sartori, and Marian (hereinafter "the authors") underscore a new trend in the study and teaching of tax law by relying on and appreciating the value of local and international conditions that affect taxation.³ *Global Perspectives on Income Taxation Law* comes at a time when increased forces of globalization have fueled a resurgence in comparative legal analysis,⁴ and comparative taxation law is concurrently beginning to develop into its own sub-discipline, introducing a rich literature of growing value.⁵

Avi-Yonah, Sartori, and Marian cautiously assert that to date, no distinct method of comparative taxation law—with its unique characteristics, processes, techniques, and approach to evaluation—has emerged.⁶ For this reason, the authors rely on what they

¹ REUVEN S. AVI-YONAH, NICOLA SARTORI & OMRI MARIAN, *GLOBAL PERSPECTIVES ON INCOME TAXATION LAW*, xviii (2011).

² See, e.g., Omri Marian, *The Discursive Failure in Comparative Tax Law*, 58 AM. J. COMP. L. 415 (2010); Carlo Garbarino, *Comparative Taxation and Legal Theory: The Tax Design Case of Transplant of General Anti-Avoidance Rules*, 11 THEORETICAL INQUIRIES LAW 765 (2010) (discussing the missed promise of comparative taxation); Carlo Garbarino, *An Evolutionary and Structural Approach to Comparative Taxation: Methods and Agenda for Research*, 57 AM. J. COMP. L. 677 (2009) (exploring methods of comparative taxation and offering an outline of an evolutionary approach to this emerging field).

³ See, e.g., Introduction, 11 THEORETICAL INQUIRIES LAW 469, 469 (2010) (According to the editors, this volume is dedicated to comparative tax scholarship and "evokes a tension inherent in the study of comparative law under conditions of globalization, between global legal convergence and [social, political, and economic] diversity."). These issues concern contextual questions such as: "Can law be productively compared across cultures? Can it be effectively transferred across cultures? Which elements in law . . . ought to be examined by scholars interested in comparative analysis and in the assessment of global process? And what, if anything, can such comparison teach us for local purposes?" *Id.*

⁴ See, e.g., DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY & THE FUTURE OF WORLD ECONOMY* (2012); JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* (2007); JOSEPH E. STIGLITZ, *GLOBALIZATION AND EGALITARIAN REDISTRIBUTION* (Pranab Bardhan, Samuel Bowles & Michael Wallerstein eds., 2006); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

⁵ Garbarino, *Comparative Taxation and Legal Theory*, *supra* note 2, at 766 ("[A]fter a long period of poor development, the debate among scholars of comparative tax law is now building up and a new web of communication and methods is beginning to evolve."); see also VITO TANZI, *TAXATION IN AN INTEGRATING WORLD* (1995); INT'L MONETARY FUND, *TAX LAW DESIGN AND DRAFTING I* (Victor Thuronyi ed. 1996); HUGH AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* (1997); INT'L MONETARY FUND, *TAX LAW DESIGN AND DRAFTING II* (Victor Thuronyi ed., 1998); VICTOR THURONYI, *COMPARATIVE TAX LAW* (2003); Michael A. Livingston, *Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Tax*, 18 CAN. J. L. & JURIS. 119 (2005); Garbarino, *An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research*, *supra* note 2; GIANLUIGI BIZIOLI & CLAUDIO SACCHETTO, *TAX ASPECTS OF FISCAL FEDERALISM – A COMPARATIVE ANALYSIS* (2011); *TAX LAW AND DEVELOPMENT* (Yariv Brauner & Miranda Stewart eds., 2013).

⁶ AVI-YONAH, SARTORI & MARIAN, *supra* note 1, at 1 ("[L]egal corporatists have usually adopted well-defined comparative methods that are used in general comparative legal studies."). In particular, the authors suggest that given the breadth of methods available for legal comparison, there may be little actual need for a single, all-inclusive method of comparative taxation law. They explain:

[O]ne of the main problems with comparative study of law is that there are probably as many approaches to it as there are comparative scholars. Although over the past three decades or so, legal comparatists have fiercely debated what approaches should be deemed appropriate when conducting a comparative study of law, they have failed to produce any coherent outcome . . . we cannot possibly point to a single approach that can be regarded as superior to others. Indeed, given

describe as a functional, problem-solving method in their analysis.⁷ Specifically, *Global Perspectives on Income Taxation Law* covers those topics customarily taught in a basic U.S. income taxation law course, but through a less commonly explored comparative prism.⁸ The authors discuss topics that range from the concepts of taxable income and tax deductions, through the taxpaying unit, tax accounting, and the taxation of capital gains and losses, to the problem of tax avoidance, issues in business taxation, and selected topics in international tax law.⁹ The authors frequently consider the approach followed in the U.S. as a benchmark for analysis. For each topic, however, they also explore the tax policy alternatives implemented in other countries, including Australia, Canada, France, Germany, Japan, the Netherlands, Sweden, the United Kingdom, Italy, and Israel.¹⁰

The underlying premise of the book is that tax law is best understood by exploring its variable development in the global sphere. Such a broad perspective facilitates a better understanding of not only the U.S. tax system, but also the range of tax policy alternatives for meeting challenges that often have much in common across different countries and tax jurisdictions.¹¹ In addition, a comparative perspective is particularly useful in taxation because of the constantly changing and contingent nature of taxation law, which virtually makes it a cross-border field.¹² Against this backdrop, a globally centered tax analysis facilitates discussions and strategies that reach beyond

that these approaches represent different ideological views, we should probably not be able to reach an agreement among ourselves as to the most promising method of comparative tax research. *Id.* at 2–3; *see also id.* at xvi ("[W]hat we are . . . offering here is a general approach to comparative tax studies that goes beyond the view of comparative taxation as an autonomous field of legal studies.").

⁷ *Id.* at 4 ("[T]he functional approach to comparative law has a long-established tradition and is probably the most widely adopted. Comparative legal functionalism rests on the assumption that 'the legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results.'") (citing KONRAD ZWIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 (1998)); *see also id.* at 12 ("[The book] follows, to a certain extent, a comparative law and economics perspective in a problem-solving-oriented manner."); *but cf. id.* ("[T]his mode of explanatory analysis is primarily technical. Namely, it does not seek to advance a particular normative choice.").

⁸ *Id.* at 16 ("[T]he organization of the book is designed to help the tax student follow the book in parallel with the regular casebook that he or she is using. Since most U.S. tax casebooks follow a basic pattern (income, deductions, the taxable unit, timing, capital gains, and so on), the book will follow the same order.").

⁹ *Id.* at vii–x (table of contents).

¹⁰ *But see id.* at 16 ("A critical comparatist will probably be quick to note this construction and may even criticize us for trying to manipulate foreign tax systems to accommodate the 'mainstream' American discourse. Point taken. We invite, by all means, critical tax comparatists to bring forward a critical analysis on the construction of comparative tax discourse around these usual focal points. This would be a much needed (and long overdue) contribution [to] the comparative tax discourse.").

¹¹ *See, e.g.,* Geoffrey Hornsey, *Corporate Taxation – A Comparative Study*, 16 MOD. L. REV. 26 (1953) (concluding from a comparative study conducted on corporate taxation in the United States, the United Kingdom, and France during the 1950s that "the one striking fact which does emerge is the universality of the problems involved and the similarity of the solutions achieved."); AVI-YONAH, SARTORI & MARIAN, *supra* note 1, at 22 ("[A]t least from a functional perspective, the design problems facing an income tax are, to a significant extent, identical across jurisdictions."). Note, however, the risk of a sampling issue with respect to the countries selected for comparison: these countries already have much in common so they are likely to produce similar tax challenges and solutions. *See also supra* note 10.

¹² AVI-YONAH, SARTORI & MARIAN, *supra* note 1, at xvii ("[T]hese issues are of real importance, first and foremost, because one of the defining characteristics of tax laws is that they are constantly changing at an amazingly rapid pace . . ."); *see also infra* notes 24–43, 72–81 and accompanying text (addressing the interdependency of taxation among nations and suggesting it is particularly exacerbated by globalization).

immediate domestic rules and mechanisms to allow both the expression of and reflection on underlying tax policy issues and solutions in a world that is closely interconnected and constantly evolving.¹³

Avi-Yonah, Sartori, and Marian's aim is not to make the reader of *Global Perspectives on Income Taxation Law* a foreign tax expert, but to provide readers with a wide comparative outlook on fundamental elements of income taxation law.¹⁴ While much of the legal tax education still lags behind actual tax practice due to its predominantly self-reliant approach, *Global Perspectives on Income Taxation Law* adds indispensable value by redirecting and broadening the discussion on tax. Although it is tailored to the prospective attorney first and foremost,¹⁵ the book reaches beyond classroom borders. It is designed to be "the start, not the end" and serves "to ignite modes of thinking."¹⁶ The authors posit that the reader is free to choose how to utilize the information the book provides.¹⁷ To this end they present a manuscript that advances the comparative tax law dialogue in a meaningful yet accessible manner.

II. GLOBALIZATION AND TAXATION LAW: THE EMERGENCE OF A CLOSER-KNIT WORLD

Global Perspectives on Income Taxation Law describes and examines tax policy arrangements across different jurisdictions, focusing on the law of income taxation, particularly personal income taxation. This comparative endeavor provides unique insight into global tax trends of the past three and a half decades, especially those trends that involve national decisions on the tax mix, including: what forms of economic income, goods, and services to tax; to what extent to tax these items; and how globalization limits and otherwise affects taxation in the twenty-first century.¹⁸ This insight is essential for evaluating globalization's effects on taxation, taking into account

¹³ AVI-YONAH, SARTORI & MARIAN, *supra* note 1, at xiii. Jinyan Li's analysis of the GAAR implementation in Canada and China is a good example of how globally centered tax analysis offers a particularly useful and in-depth perspective. Li notes that while the purpose of both GAARs is anti-avoidance, the policy underlying this legislation does not automatically translate into the Chinese culture. This mismatch leads to a very different GAAR implementation in the two countries. Jinyan Li, *Tax Transplants and Local Culture: A Comparative Study of the Chinese and Canadian GAAR*, 11 THEORETICAL INQUIRIES LAW 655, 681 (2010). A similar argument in favor of exploring underlying tax policy decisions before transplanting them is also one of the main points made in Omri Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 Va. Tax Rev. 133, 203 (2012) ("[A]s much as a comparative approach [in the corporate tax context] is desirable, it is also dangerous if ill executed. Bad comparisons produce inaccurate guidance that may not bring about the desired results of tax reform.").

¹⁴ Exploring key elements of income taxation law from a comparative perspective is a key goal for the authors. See, e.g., AVI-YONAH, SARTORI & MARIAN, *supra* note 1, at xix ("[A]ny future lawyer should, at the minimum, understand some basic notions of foreign taxation.").

¹⁵ See, e.g., *id.* at xiii (addressing the issue of student readership and noting that, despite a revival of comparative tax law scholarship, no book currently exists for student consumption).

¹⁶ *Id.* at 16.

¹⁷ *Id.*

¹⁸ Cf. Neil Brooks & Thaddeus Hwong, *Tax Levels, Structures, and Reforms: Convergence or Persistence*, 11 THEORETICAL INQUIRIES LAW 791 (2010) (exploring the effect of globalization on three components of the tax mix: (1) individual tax rates and revenue; (2) corporate tax rates and revenue; and (3) the tax base, particularly VAT and its expansion); Reuven S. Avi-Yonah, *Tax Convergence and Globalization* 1 (Pub. L. and Legal Theory Working Paper Series, Working Paper No. 214, 2010) (arguing that, due to globalization, convergence can be detected in several areas of taxation, including: (1) countries' overall tax mix (defined as the composition of total tax revenue that usually includes personal and corporate income taxes, social security contributions, property taxes, excise taxes, and the like); (2) issues of corporate/shareholder tax integration; and (3) the choice between worldwide and territorial taxation).

its risks and benefits, and exploring the mechanisms available to governments to manage and otherwise address these effects.

Tax law comparatists generally share the belief that the world has become increasingly globalized after the mid-1980s.¹⁹ As a historical process above all else, globalization has significantly, albeit sometimes subtly, affected key aspects of national performance.²⁰ The term globalization usually refers to the increased integration and liberalization of markets around the world.²¹ Globalization, however, encompasses a wider array of forces, including human innovation, technological progress, and the convergence of social and cultural norms.²² These forces are often understood to pull nations together, forming a close-knit world.²³ Despite vast differences in national characteristics—including language, history, location, and natural resources—one implication of globalization's increased closeness is that forces at play within any one country can easily cause a chain reaction, transcending traditional borders to shape and affect other sovereign nations.²⁴ This cross-country dependency generates ripples of

¹⁹ See, e.g., Avi-Yonah, *Tax Convergence and Globalization*, *supra* note 18, at 1 (indicating that the "period of globalization" commenced "from around 1980, [when] most countries began relaxing restrictions on capital mobility"); James R. Hines, Jr. & Lawrence H. Summers, *How Globalization Affects Tax Design*, 23 TAX POLICY AND THE ECONOMY 123, 134 (Jeffrey R. Brown et al. eds., 2009) ("The incentive to reduce corporate tax rates in order to attract foreign direct investment has increased since the early 1980s, as levels of world foreign direct investment rose sharply during that time."); International Monetary Fund (IMF) Staff, *Globalization: A Brief Overview*, 2 IMF ISSUES BRIEF 1–2 (May 2008), available at <http://www.imf.org/external/index.htm> ("The term 'globalization' began to be used more commonly in the 1980s, reflecting technological advances that made it easier and quicker to complete international transactions – both trade and financial flows.").

²⁰ The precise origin of globalization is debatable and generally depends on the scope and breadth of one's conceptualization of it. Some historians date globalization as far back as the third millennium B.C., while modern globalization is generally understood to have begun in the late nineteenth century. Notwithstanding the exact origin of globalization, its definition and various applications continue to evolve. For instance, debates over globalization and its effect on international tax neutrality began as early as the Kennedy Administration and continue to this date. See, e.g., Michael S. Knoll, *The Connection Between Competitiveness and International Taxation*, 65 TAX L. REV. 349, 363 (2012) (explaining that "Since the Kennedy Administration, two neutrality principles have dominated U.S. international tax policy and the debate over what that policy should be: capital export neutrality (CEN) and capital import neutrality (CIN)."). See also *id.* at 363–69 (further discussing CEN and CIN).

²¹ IMF Staff, *supra* note 19, at 3–4 (indicating, for example, that "[a] core element of globalization is the expansion of world trade through the elimination or reduction of trade barriers").

²² See, e.g., Dani Rodrik, *Sense and Nonsense in the Globalization Debate*, FOREIGN POL'Y, Summer 1997, at 19, 27 ("As the technology for manufactured goods becomes standardized and diffused internationally, nations with different sets of values, norms, institutions, and collective preferences begin to compete head on in markets for similar goods."); see also Hines & Summers, *supra* note 19, at 126–27 ("The world economy has grown considerably more open and integrated in every decade since the Second World War While this reflects in part the growth of the world economy, it also reflects the impact of reduced transportation and communication costs, falling tariff rates, and reductions in other impediments to international business.").

²³ See, e.g., IMF Staff, *supra* note 19, at 7 (using the 2007–2008 financial crisis to illustrate how close-knit the world has become as a result of globalization: "Credit market strains have intensified and spread across asset classes and banks, precipitating a financial shock that many have characterized as the most serious since the 1930's. [This episode is a reminder] that a breakdown in globalization—meaning a slowdown in the global flows of goods, services, capital, and people—can have extremely adverse consequences."); see also THOMAS FRIEDMAN, *THE DELL THEORY OF CONFLICT PREVENTION, EMERGING: A READER* 49 (Barclay Barrios, ed. 2008) (examining the impact of the "flattening" of the world due to forces of globalization and stating that "globalized trade, outsourcing, supply-chaining, and political forces have [all] changed the world permanently, for both better and worse.").

²⁴ For a pragmatic view of the cross-border tax dependency effect of globalization, see, e.g., Brian Purcell, *How the U.S. Corporate Rate Could Compete with Ireland*, INT'L TAX REV., Dec.–Jan. 2012, at 21,

cause and effect so powerful that taxation runs the risk—or enjoys the benefit—of being redefined on a national, as well as international, level.²⁵

Importantly, as nations become increasingly interdependent, their risk of being pressured into tax competition also intensifies. Broadly stated, tax competition involves a strategic, non-cooperative interaction among nations,²⁶ with each nation designing its tax system in response to the tax arrangements of other countries to attract and retain productive resources.²⁷ To be exact, competitive tax interactions are not limited to nations and generally require additional parties, particularly multinational corporations, but also other incorporated entities, households, and individuals.²⁸

21 (arguing that the U.S. and the E.U. should stop complaining that Ireland's corporate tax rate is "unfair" and, instead, lower their own corporate rates).

²⁵ See Org. for Econ. Co-operation and Dev. (OECD), TAX POLICY REFORM AND ECONOMIC GROWTH 20 at Box 1.1 (2010), available at <http://www.oecd.org/ctp/tax-policy/taxpolicystudyno20-taxpolicyreformandeconomicgrowth.htm> ("[The effects of globalization] mean that individual countries are likely to make different tax policy choices from those they would have made in the past, when there was less mobility."); see also Vito Tanzi, Remarks at the Conference Organized by the School of International Studies, University of Trento: Globalization and International Harmonization of Tax Systems 8 (May 27, 2004), transcript available at <http://www.unitn.it/files/download/9722/wptanzitanno.pdf> ("What has happened during the last 20 years is that with the liberalisation of trade, and the enormous movements of capital at an incredible pace (each day the equivalent of the Italian GDP [from one country to another]) . . . domestic fiscal problems start to become international problems, and this has consequences.").

²⁶ See, e.g., Tanzi, *supra* note 25, at 8 ("The global economy has become a sort of commons, like the oceans or the atmosphere, which a shrewd country may exploit for its own purposes. For example, by radically lowering tax rates on incomes from financial activities one can attract capital from other countries."); see also VITO TANZI, TAXATION IN AN INTEGRATING WORLD 6 (1994) ("Like tectonic plates grinding against each other, the tax systems of different countries will develop arbitrage pressures created by different tax rates, by differences in the bases that are taxed, by different possibilities of avoidance and evasion, and so forth."). Importantly, tax competition may also occur on a sub-national level. For an empirical analysis of this phenomenon, see, e.g., OECD, TAX COMPETITION BETWEEN SUB-CENTRAL GOVERNMENTS (2011), available at <http://www.oecd.org/ctp/federalism/48817035.pdf> (finding, for example, that "tax competition is not only an issue for federal countries, but also for unitary countries where local governments often have far-reaching tax autonomy"). *Id.* at 5; see also *id.* at 7–8 (introducing the concepts of "vertical and horizontal tax competition").

²⁷ Importantly, the strategic, non-cooperative interaction entailed in tax competition presumes that any benefit for one economic actor is necessarily gained at the expense of other actors, under the framework of a zero-sum game. From the early 1980s to about the late 1990s, a key manifestation of the non-cooperative tax dynamics among nations took the form of traditional tax havens, where jurisdictions offered no—or significantly reduced—tax on investments with little or no commitment to the region. More recently, tax competition often takes the form of production tax havens, which became common in countries like Ireland, where a low rate (12.5%) is given to foreign corporations who move their manufacturing to that country. See Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1579, 1601 (2000); Rodrik, *Sense and Nonsense in the Globalization Debate*, *supra* note 22, at 23 (explaining that globalization allows corporations to "go abroad" to find the best "prices," putting nations in a competitive stance against each other for corporate investment).

²⁸ Eric Toder explains:

We [the United States] . . . compete with other nations . . . We compete to attract productive resources, such as high-skilled workers or investment capital. U.S. and foreign-resident corporations compete with each other in international markets, and corporations can exert some choice about where to establish and maintain residence. Governments may exert competing claims against each other for tax revenues associated with economic activities that transcend national boundaries.

Eric Toder, URBAN-BROOKINGS TAX POL'Y CTR, INTERNATIONAL COMPETITIVENESS: WHO COMPETES AGAINST WHOM FOR WHAT? 5 (2012), available at <https://www.law.upenn.edu/live/files/368-toderpdf>. But cf. *Hearing on the Need for Comprehensive Tax Reform to Help American Companies Compete in the Global Market and Create Jobs for American Workers, Before the H. Comm. on Ways and Means*, 112th Cong. 9 2-3 (2011) (statement of Jane Gravelle, Senior Specialist in Economic Policy, Congressional Research Service),

One commonly invoked example of the strain that globalization places on the dynamics among nations—particularly its inducement of national and international tax competition—concerns the taxation of capital income, or the deficiency thereof.²⁹ Many consider it to be an axiom of modern globalization that it involves the relaxation of trade barriers, leading to the enhanced mobility of productive resources, especially capital.³⁰ As capital increases its mobility relative to other economic resources, there is a natural shift in the tax base from capital to other, less agile, sources.³¹ For example, consumption taxes, such as the Value Added Tax (VAT) and General Sale Tax (GST), tend to fall on consumers who are generally less mobile than capital holders and producers.³² The latter groups possess a greater ability to respond to taxation by strategically adjusting their economic choices to minimize their tax liability.³³ In recognition of this propensity,

available at <http://waysandmeans.house.gov/uploadedfiles/gravelle.pdf> (suggesting that, despite its widespread use, the term competitiveness is ill fitted when it comes to nations: "Although the term competitiveness has been invoked in the debate about U.S. policy in the global economy, it is not *countries* that are competitive, it is *companies* that are. A company generally thinks of itself as competitive if it can produce at the same cost as, or a lower cost than, other firms. But a country's firms cannot be competitive in all areas. Indeed, even if firms in a country are more productive in all other countries in every respect, a country would still tend to produce those goods in which its relative advantage is greatest and trade with other countries for the goods they do not have a relative advantage in productivity In sum, companies compete, and countries trade.").

²⁹ In the context of capital taxation, the data suggests that the real difficulty concerns capital income taxes that are source-based (such as the corporate income tax) or that are based on corporate residence, which is more easy to shift overseas than individual residence. This is compared with capital income taxes that are residence-based at the individual taxpayers level, that do not suffer from the same movable tax bases problems. See Rosanne Altshuler et. al., *Capital Income Taxation and Progressivity in Global Economy*, 30 Va. Tax Rev. 355 (2010) (making the assertion that because the U.S. taxes on capital gains and dividends do not distinguish between gains and dividends arising from assets in the U.S. and assets located elsewhere, they do not cause an outflow of capital from the US. Accordingly, the author advance a proposition for reducing the (source-based) U.S. corporate tax rate and increasing the (residence-based) U.S. tax on individuals' capital gains and dividends).

³⁰ See, e.g., IMF Staff, *Globalization: A Brief Overview*, *supra* note 19, at 4 ("Global capital flows fluctuated between 2 and 6% of world GDP during the period 1980–95, but since then they have risen to 14.8% of GDP, and in 2006 they totaled \$7.2 trillion, more than tripling since 1995.").

³¹ Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, 34 BROOK. J. INT'L L. 783, 789–90 (2008–2009); but see OECD, *supra* note 25, at 20, Box 1.1 (addressing the increased mobility of labor and explaining that "[i]t is generally assumed that choices related to corporate taxation are most affected by globalization because of the ease with which multinational enterprises can move the location of at least some of their activities. However, highly skilled workers are also becoming more mobile and some countries are taking this into account in designing their personal tax systems. In contrast, the taxation of lower-skilled workers and of consumption is seen as being less affected by globalization because these taxes are less mobile.").

³² The VAT and GST are different names for what is essentially the same type of tax. To illustrate the relatively inelastic and regressive nature of this tax, consider the following excerpt during a U.S.

Congressional hearing on the Value Added Tax, in response to a question on who bears the burden of VAT:

[With a consumption tax, such as the VAT] [t]he burden is borne by consumption. And so, it depends on what your consumption is relative to your income. People with low incomes consume virtually all of their income. People in the middle bracket save some. That would not be taxed. People in the upper brackets *save almost all of their income*. . . .

Tax Reform and Consumption-Based Tax Systems: Hearing Before the H. Comm. on Ways and Means, 112th Cong. 15 (2011) (statement of Mr. Bruce Bartlett, Former Domestic Policy Adviser to President Ronald Reagan, Columnist, Tax Notes, The Fiscal Times, Contributor to The New York Times) (emphasis added), available at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=289865>. See also *infra* note 47 and accompanying text.

³³ See, e.g., Brooks & Hwong, *supra* note 18, at 793 ("[T]axes on capital income will be reduced as countries compete for corporate investments and as the increased mobility of capital makes enforcement of capital taxes difficult or impossible . . ."). Cf. Hines & Summers, *supra* note 19, at 126 (explaining that: "In

governments seek to stabilize revenues and limit the economic distortions stemming from tax planning by levying taxes in circumstances, and with respect to resources, that are less responsive to tax; the result has been, *inter alia*, a worldwide rise of the VAT and GST and a corresponding aversion towards the taxation of capital, especially on the corporate end.³⁴

Furthermore, the increased mobility of productive resources intensifies the pressure on all countries to compete for these resources by lowering their tax rates and, subsequently, strategically broadening their bases.³⁵ It is against this backdrop that tax comparatists commonly argue that globalization has resulted in an increased worldwide reliance on consumption taxes, accompanied by a corresponding "flattening" of personal income tax rates and drastic reduction in corporate income tax brackets.³⁶ According to a 2011 OECD report on tax trends among OECD member countries:

In the mid-1980s, many OECD countries had top marginal personal income tax (PIT) rates in the excess of 65%. Today most top rates are below, and in some cases substantially below, 50% Similarly, top statutory corporate income tax rates in the 1980s were rarely less than 45%. In 2011, the OECD average rate was below 26%.³⁷

Compared with personal income taxation, corporate tax rates exhibit a particularly steep decline during the past three and a half decades. The 2010 U.S. President's Economic Advisory Board Report on Tax Reform Options illustrates this drop in both the U.S. corporate tax rate and the average and median corporate tax rates

a globalizing world, expenditures have relatively clear geographic associations, reducing the potential for international tax avoidance and generally reducing the mobility of the tax base compared to alternatives such as personal income taxes or source-based business taxes including corporate income tax.").

³⁴ See *supra* note 29 and accompanying text. See also OECD, CONSUMPTION TAX TRENDS 2012: VAT/GST AND EXCISE RATES, TRENDS AND ADMINISTRATION ISSUES 11 (2012), available at http://www.oecdilibrary.org/taxation/consumption-tax-trends-2012_ctt-2012-en ("VAT is the most widespread general consumption tax in the world having been implemented by over 150 countries and in 33 of the 34 OECD countries."); Brooks & Hwong, *supra* note 18, at 793 (indicating that "there will be a shift to immobile and more regressive tax bases such as consumption, payrolls, and real property"); Avi-Yonah, *Tax Convergence and Globalization*, *supra* note 18, at 3–4 (exploring the implications of tax-base mobility and noting that "[t]he shift to dual income taxes and the shift in the corporate tax from production to consumption locations reflect the same concern about the vanishing [income tax] base").

³⁵ OECD, TAX REFORM TRENDS IN OECD COUNTRIES 3 (2011), available at <http://www.oecd.org/ctp/48193734.pdf> Importantly, broadening the tax base is not necessarily beneficial in the competition for investments because this generally raises the effective tax rate. A lower rate broader base tax, however, may lead to a shift in reported income, which is more sensitive to the statutory tax rate than real investments. See Toder, *supra* note 28. See also Michael Keen, *Tax Competition*, in NEW PALGRAVE DICTIONARY OF ECONOMICS (2008); Michael Devereux, Ben Lockwood, & Michaela Redoano, *Capital Account Liberalization and Corporate Tax* (IMF Working Paper No. 03/180, 2003), available at <http://www.imf.org/external/index.htm> (demonstrating how capital account liberalization, in particular, tends to lead to lower corporate tax rates and increases strategic interactions among countries).

³⁶ Note, however, that personal rates have been undergoing a process of "flattening" over approximately the past 20 years, while the reduction in marginal personal and corporate rates has been evident for a period of about 30 years. Brooks & Hwong, *supra* note 18, at 802–14. For an argument suggesting that over a longer-term perspective no convergence of nominal corporate tax rates can be seen, see Omri Marian, *Do Tax Laws Truly Converge? A Case Study of Corporate Tax Rates in 11 Industrialized Countries*, in *The Discursive Failure In Comparative Tax Law*, 121, 137–43 (unpublished S.J.D. Thesis presented at the University of Michigan Law School) (2009).

³⁷ OECD, *supra* note 35, at 3. See also *id.* at 4, fig.1 ("The trend toward reduced [personal income] marginal tax rates started in the mid-1980s in most countries, with the U.S. reforms of 1986 being particularly influential. In the late 1970s it was not uncommon to find top marginal personal income tax rates above 70%, while these rates are now well below 50% in a majority of OECD countries.").

for OECD member countries. The U.S. statutory corporate tax rate dropped from 50% in 1981 to close to 40% in 2009, while OECD member countries experienced a decrease in median and average rates from approximately 47% in 1981 to about 28% in 2009.³⁸ Likewise, according to the International Monetary Fund (IMF) *Globalization, Financial Markets, and Fiscal Policy Report*, since the mid-1980s statutory corporate tax rates in industrial countries have declined from an average of about 45 percent in 1982 to approximately 35 percent in 2004, with a similar downward trend in effective rates.³⁹

Despite drastic reductions in corporate income tax rates, evidence for the period from 1965 to 2010 shows that, over time, total OECD corporate revenues as a percentage of total receipts not only remained stable but, in fact, slightly increased.⁴⁰ Notwithstanding the significance of this finding, even though corporate tax revenues may appear robust, they could easily decline if tax competition intensifies, as globalization might entail. For example, according to Jane Gravelle, Senior Specialist in Economic

³⁸ THE PRESIDENT'S ECONOMIC ADVISORY BOARD REPORT ON TAX REFORM OPTIONS: SIMPLIFICATION, COMPLIANCE, AND CORPORATE TAXATION 68, fig. 4 (2010), *available at* http://www.whitehouse.gov/sites/default/files/microsites/PERAB_Tax_Reform_Report.pdf (exploring the combined federal and state corporate tax rate and explaining that "As a result of these differences between the U.S. and the OECD countries, U.S. firms operating abroad report that they often face higher effective tax rates on their overseas activities than foreign competitor firms. In addition to affecting the international competitiveness of U.S. firms, the growing gap between the U.S. [statutory] corporate tax rate and the corporate tax rates of most other countries generates incentives for U.S. corporations to shift their income and operations to foreign locations with lower corporate tax rates to avoid U.S. taxes. Over time as corporate tax rates have fallen around the world, these incentives have become stronger."). *Id.* at 69; *cf. id.* at 65 ("The United States has the second highest statutory corporate income tax rate in the Organization for Economic Co-operation and Development (OECD) behind Japan. Despite the high statutory rate, the average effective tax rate paid by corporations is close to the OECD median, and the corporate tax raises relatively little revenue—the fourth lowest in the OECD as a share of GDP.").

³⁹ IMF, Fiscal Affairs Department, *Globalization, Financial Markets, and Fiscal Policy*, INTERNATIONAL MONETARY FUND 6 (2007), *available at* <http://www.imf.org/external/index.htm> (indicating, however, that not all countries react to globalization in a similar manner, with some countries affected more adversely than others). For example, "the decline [in corporate tax rates] has been especially pronounced in some EU countries such as Austria, Denmark, Finland, Portugal and Sweden, and also in emerging market countries in Europe . . . The evidence for emerging markets in Asia and Latin America also suggests a recent decline in corporate tax rates." *Id.*; AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 129–30, n.138 (citing an OECD report indicating that 17 OECD member countries experienced a decline in average statutory corporate tax rate from 50.9% in 1982 to 38.3% in 1997); *id.* at 138 (suggesting that evidence for all OECD member countries demonstrates a consistent drop from an average statutory corporate tax rate of 33.6% in 2000 to an average of 28.4% in 2006, and adding that similar findings are available for corporate effective marginal and effective average rates); *cf.* CONGRESSIONAL BUDGET OFFICE, CORPORATE INCOME TAX RATES: INTERNATIONAL COMPARISONS 36, 39 (2005), *available at* <http://cbo.gov/sites/default/files/cbofiles/ftpdocs/69xx/doc6902/11-28-corporatetax.pdf>; OECD, Policy Brief, *Reforming Corporate Income Tax*, OECD OBSERVER, July 2008, at 3 fig.2, *available at* <http://www.oecd.org/tax/taxpolicyanalysis/41069272.pdf> (illustrating the decline in average effective corporate tax rates (AETR) from 1982 to 2005). Avi-Yonah, Saratori and Marian suggest that the trend of rate reduction is also evident for developing countries. AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 138–39.

⁴⁰ See AVI-YONAH, SARATORI & MARIAN, *supra* note 1, at 141 n.144 (citing an NBER study reporting that since the 1970s, of all the G7 countries, only Japan showed evidence of a substantial decline in corporate tax revenues); IMF, *supra* note 39, at 6 ("[D]espite the reduction in statutory and effective tax rates, corporate tax revenue had held up well. Indeed, industrial countries have experienced an increase in corporate tax revenue on average, both relative to GDP and to total tax revenue."). However, while the overall OECD total suggests that corporate revenues as a percentage of total receipts has slightly increased over time, this trend varies from nation to nation. See OECD, REVENUE STATISTICS 2012, at 110 tbl.12 (2012), *available at* http://www.oecdilibrary.org/taxation/revenue-statistics-2012_rev_stats-2012-en-fr (comparing corporate taxes as a percentage of total receipts from 1965 to 2010).

Policy of the Congressional Research Service, any gains from cutting corporate rates "would be reduced if other countries responded to a U.S. rate cut by reducing their own taxes."⁴¹ This domino effect in tax rate cuts is a very real possibility, as "evidence suggests that the U.S. [corporate tax] rate cut in the Tax Reform Act of 1986 might have triggered rate cuts in other countries."⁴² In fact, data for the U.S. depicts a drastic drop in corporate tax revenues since 1950, from approximately 26% of total tax receipts to only 8% in 2010.⁴³

In addition, the observed upward trend in total OECD corporate tax revenues, as a percentage of total receipts, is likely to be the result of a number of factors. Some of these factors may not necessarily represent a true increase in collection, but rather mask other economic developments. Such are, for example, greater corporate profitability and a shift in the income tax base from personal to corporate, as taxpayers take advantage of incorporation and the associated lower tax rates.⁴⁴ This, in turn, leads to a growing corporate sector that yields more taxes mainly due to its increased volume.⁴⁵ Worldwide corporate tax-base broadening, particularly among OECD member countries, is another potential contributor to the improved corporate revenue yield.⁴⁶

⁴¹ *Hearing on the Need for Comprehensive Tax Reform to Help American Companies Compete in the Global Market and Create Jobs for American Workers*, *supra* note 28, at *Before the H. Comm. on Ways and Means*, 112th Cong. 9 (2011) (statement of Jane Gravelle, Senior Specialist in Economic Policy, Congressional Research Service), available at <http://waysandmeans.house.gov/uploadedfiles/gravelle.pdf>; see also OECD, *supra* note 35, at 6 fig.6 ("The tax cuts introduced by [corporate and personal tax reforms] have not led to a fall in the overall tax burden (measured by the tax-to-GDP ratio) . . . Indeed, the overall trend in tax burdens was upward until 2000" and increased again in 2006 and 2007, with another dip after the fiscal crisis due to decreased economic activity); but see Avi-Yonah, *The OECD Harmful Tax Competition Report*, *supra* note 31, at 790 ("While in developed countries this decline in rates was matched by a broadening of the tax base, so that no decline in revenues can be observed, in developing countries the same period witnessed a decline of corporate tax revenues by about 20% on average. This decline is particularly important in light of the larger share of tax revenues produced by the corporate tax in developing countries (an average of 17%) as opposed to developed countries (an average of 7%).").

⁴² *Hearing on the Need for Comprehensive Tax Reform to Help American Companies Compete in the Global Market and Create Jobs for American Workers*, *supra* note 28, at 9 (statement of Jane Gravelle). Cf. OECD, *supra* note 35, at 5 (attributing the inception of the corporate income tax rate reduction trend to the UK and USA tax reforms undertaken in the mid-1980s).

⁴³ Memorandum from Senator Carl Levin, Permanent Subcomm. on Investigations, Hearings on Offshore Profit Shifting, submitted as evidence for the Congressional Hearing on Sept. 20, 2012, exhibit #1b, available at

<http://www.levin.senate.gov/newsroom/press/release/subcommittee-hearing-to-examine-billions-of-dollars-in-us-tax-avoidance-by-multinational-corporations/?section=alltypes> (follow the hyperlink to "PSI Charts on Offshore Profit Shifting") (depicting a downward trend in U.S. corporate revenues from the 1950s and a plateau since the 1990s). The memorandum also indicates that as corporate revenues decreased from 1950 to 2010, payroll taxes increased from about 8% of tax revenue in 1950 to approximately 40% in 2010. *Id.* at 4–5 (follow the hyperlink to "PSI Memo on Offshore Profit Shifting and the U.S. Tax Code").

⁴⁴ This is true in most of the OECD where the personal rate is higher than the corporate rate, but not so much in the U.S., where the top statutory rates have differed little in the past 25 years. See, e.g., Brooks & Hwong, *supra* note 18, at 809 ("One important reason why corporate tax revenues [among OECD member countries] have increased even though rates have been reduced is that corporate tax profits as a share of GDP have increased greatly over the past twenty or so years.").

⁴⁵ *Id.* ("In many countries . . . corporate profits as a percentage of GDP had reached historically unprecedented levels just before the worldwide economic meltdown.").

⁴⁶ See AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 142; Brooks & Hwong, *supra* note 18, at 804 ("[The reduction in the corporate tax rate as a result of the 1986 Tax Act] cut the U.S. tax rate from 46 to 34 percent. This reduced rate was more than compensated by base-broadening measures."); but see *id.* at 810–11 ("Mooij and Nicodème have recently estimated that as high as over 20 percent of annual corporate

Over the past few years, prominent tax scholars and analysts have more vocally endorsed the proposition that the long-run flattening of personal and corporate income tax rates, and the move away from taxation of capital and high-income taxpayers more generally to less mobile taxpayers and resources such as consumption and labor, seriously distort tax structures while rendering tax systems around the world more regressive.⁴⁷ Reuven Avi-Yonah explains: "[C]ountries that formerly relied on income tax revenues now must increase relatively regressive taxes, such as consumption and payroll taxes, which in recent years have been the fastest growing taxes in the member countries of the Organization for Economic Co-operation and Development (OECD)."⁴⁸

A holistic view of global tax trends during the past thirty-five years thus suggests that, in order to meet present-day challenges, nations and their tax systems must reconsider the available revenue sources—either within or outside the tax realm—as well as the alternative of cutting back on government spending, given the risk of revenue decline.⁴⁹ While either option has significant tax implications, both also concern a range

tax revenue can be explained by the shift in the tax base from relatively higher-taxed personal income to lower-taxed corporate income.").

⁴⁷ See, e.g., Permanent Subcomm. on Investigations, Offshore Profit Shifting Memorandum, *supra* note 43 (indicating an erosion in corporate tax revenue and a parallel increase in payroll taxes from 1950 to 2010); Avi-Yonah, *supra* note 31, at 795 (concluding that if harmful tax competition is "left unchecked, the dire predictions of a twenty-first century world based on the VAT, while perhaps premature, could in time still be borne out"). For a discussion of opposing claims that the move toward a greater usage of consumption and payroll taxes may not be troubling and, moreover, that it is the very reason why welfare states have been able to continue to fund their growing expenditures, see, e.g., Brooks & Hwong, *supra* note 18, at 815 (noting that one possible argument for consumption taxes is that "a revenue shift to regressive taxes makes it politically easier to maintain a large public sector") (quoting JUNO KATO, *REGRESSIVE TAXATION AND THE WELFARE STATE* (2003)). See also Neil Brooks, *A Restatement of the Case for Progressive Income Tax*, in *TAX REFORM IN THE 21ST CENTURY: A VOLUME IN MEMORY OF RICHARD MUSGRAVE* 277, 333 (John G. Head & Richard E. Krever eds., 2009) ("[T]he fact that transfers can be relatively effective at reducing inequalities has led some commentators to suggest that progressive taxes are not needed for achieving a more equal society."); but see Brooks & Hwong, *supra* note 18, at 818 ("However, if there is a case for redistributing from the very rich, because they have no moral claims to their vast incomes or because their economic power threatens democratic values and the quality of life in a society, then transfer payments cannot, obviously, be used for this purpose."). Furthermore, with respect to taxing labor, such measures may ultimately undermine the supposed economic growth rationale they are meant to encourage. See, e.g., OECD, *supra* note 25, at 122 ("It is also possible that labour taxes influence foreign direct investment adversely by increasing labour cost in the host country. For instance, [one scholar] found that the impact on FDI of labour taxes is generally substantially larger than that of cross-border effective corporate tax rates . . . This can hinder technology transfers and spillovers of best practices from multinationals to domestic firms . . .").

⁴⁸ Avi-Yonah, *supra* note 27, at 1577; see also OECD, *supra* note 25, at 27 ("There has been a continuously growing share of social security contributions, which by 2007 accounted for 25 per cent of total revenues, apart from France, Italy, the Netherlands, and Spain, where the share has decreased."); Avi Yonah, *supra* note 31, at 789 (addressing the regressive nature of alternative methods of raising revenue and arguing that "[j]urisdictions that had previously relied on income tax revenues must resultantly supplement their tax revenue by raising more regressive taxes," such as taxes on labor and consumption). Relatively speaking, the regressive shift in revenue sources is less evident in the United States. Here, the shift toward more regressive revenue sources at the federal level (e.g., the payroll tax) has been largely offset by increased progressivity of the individual income tax, especially at the bottom end where there has been a large growth in refundable credits, especially for families with children. However, putting aside the less than ideal trade-off, these trends have substantially restrained the U.S. from making its tax system more progressive in response to growing inequality of pretax incomes. See, e.g., Congressional Budget Office (CBO), *THE DISTRIBUTION OF HOUSEHOLD INCOME AND FEDERAL TAXES*, 2010 (December 2013), available at <http://cbo.gov/sites/default/files/cbofiles/attachments/44604-AverageTaxRates.pdf>.

⁴⁹ See, e.g., Rodrik, *supra* note 22, at 23 (addressing the tenuous trade-off between increased globalization and government provision of a social safety net and stating that "a key component of the

of broader and more nuanced policy dilemmas, such as distribution, efficiency, and national and societal identity. Discussing some of these dilemmas, Tsilly Dagan argues that with increased globalization the focal point of nations' public policy has been profoundly altered. According to Dagan:

The incentive to cater to the preferences of the more attractive and mobile among the potential residents and investors pushes policy makers to curtail states' redistribution functions. It requires them to choose between their original constituents and others — possibly more attractive ones (in terms of their own political interests as well as . . . the collective welfare pie).⁵⁰

Underscoring similar issues, a 2010 OECD Tax Policy Reform and Economic Growth Report further asserts that "policy makers will need to examine very carefully the tradeoff between . . . growth-enhancing proposals and other objectives . . . particularly equity."⁵¹

III. AVOIDING THE STRAINS OF GLOBALIZATION – COOPERATION, HARMONIZATION AND OTHER TAX RELATED INITIATIVES

Whatever form the future nation-state takes, globalization offers nations and their tax systems both an abundance of benefits and some embedded perils.⁵² Importantly, globalization highlights the value of imposing a measure of restraint on the competitive dynamics among nations. An IMF report advises:

implicit postwar social bargain in the advanced industrial countries has been the provision of social insurance and safety nets at home (unemployment compensation, severance payments, and adjustment assistance, for example) in exchange for the adoption of freer trade policies"; *id.* at 26 ("Globalization [and the related competition it entails] increas[es] the demand for social insurance while *simultaneously constraining* the ability of governments to respond effectively to that demand.") (emphasis added).

⁵⁰ Tsilly Dagan, *Dilemmas of Tax Policy in a Globalized World*, in TAX LAW AND DEVELOPMENT 57, 59 (Yariv Brauner & Miranda Stewart eds., 2013). *See also* Rodrik, *supra* note 22, at 23 (explaining that nations are making drastic changes that significantly affect longtime social customs in order to increase their competitiveness in the global economy. Such changes include, for instance, Japan's dismantling of its policy of lifetime employment and South Korea's relaxation of its firing restrictions). For a more recent example, consider Michigan's legislation seeking to limit the ability of unions to negotiate. One key justification for this legislation was that it would encourage U.S. companies to "bring jobs back to the states." *See* Brian Montopoli, *Right-to-Work Signed into Law in Michigan*, CBS NEWS, Dec. 11, 2012, available at http://www.cbsnews.com/8301-250_162-57558532/right-to-workpoised-to-become-law-in-michigan/.

⁵¹ OECD, *supra* note 25, at 24; *but see* Michael Livingston, *From Mumbai to Shanghai with a Side Trip to Washington: China, India, and the Future of Progressive Taxation in an Asian-Led World*, 11 THEORETICAL INQUIRIES LAW 539, 544–45 (2010) ("Even when [progressivity] is accepted as a goal of tax policy, [it] may clash with other goals such as economic efficiency, simplicity, or administrability, and competitiveness with other nations . . . Beyond that, some . . . nations may simply assign a low priority to tax equity, believing that it is more important to let the 'pie get bigger for everyone.'").

⁵² *See, e.g.,* OECD, *supra* note 26, at 5 (discussing the issue of sub-central tax competition and outlining arguments both for and against tax competition). For a helpful discussion on the benefits of globalization, *see, e.g.,* Tanzi, *supra* note 25, at 6 ("Globalisation obviously leads to a more efficient use of capital. In theory the capital produced . . . can be invested in those areas and countries where they yield more . . . I myself have argued repeatedly that perhaps [the capital flight from Latin America] was not altogether a bad phenomenon, because . . . while they were abroad they yielded fairly high interest rates, they did not pay taxes and accumulated fortunes, which in theory, could return to Latin America."); TYLER COWEN, CREATIVE DESTRUCTION (2002) (embracing cross-cultural exchanges brought about by globalization). For the perils of globalization, *see, e.g.,* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002) (discussing the shortcoming of global economic theory and the manner in which key institutions of globalization have failed developing countries they were meant to help).

Globalization can . . . create a framework for cooperation among nations on a range of non-economic issues that have cross-border implications, such as immigration, the environment, and legal issues. At the same time, the influx of foreign goods, services, and capital into a country can create incentives and demands for strengthening the education system [among other national infrastructures], as a country's citizens recognize the competitive challenge before them.⁵³

Monitoring, defusing, and otherwise addressing tax competition would allow nations to manage the threat of a competition-driven race to the bottom among them. This race undermines their ability to tax and raise revenue, particularly from the most mobile resources and taxpayers.⁵⁴ Similarly, monitoring and thoughtfully addressing the competitive cycle may also safeguard the capacity of nations to utilize their tax systems toward goals other than financing basic government goods and services, such as redistributing income and improving societal well-being.⁵⁵

Policies aimed at addressing international tax competition have been traditionally understood to include measures that advance cooperation, harmonization, and integration of national tax structures, policies, and administrations.⁵⁶ Until recently, however, such

⁵³ IMF Staff, *supra* note 19, at 2; see also Allison Christians, Steven Dean, Diane Ring, & Adam Rosenzweig, *Taxation as a Global Socio-Legal Phenomenon*, 14 ILSA J. INT'L & COMP. L. 303, 305 (2008) ("[T]he miracle [of an international tax regime] is flawed because of the failure of states to agree on an increasingly lengthy list of key areas . . . In effect, the flaw . . . is a series of unrelieved collective action problems among states, each multiplying the harm of the other . . . The need for revenue to address [growing inequality and growing social needs] and the increasing unease about the distributional effects of regulation in an economically integrated world, require that this web of collective actions be addressed and, if possible, overcome . . . Further, states cannot raise revenue effectively or fairly in the modern international economic regime without interacting with other states and their citizens, as people, goods, services, and capital increasingly cross global borders.").

⁵⁴ For example, the U.S. Congress is concerned about the ability of multinational entities to escape paying income tax. The Permanent Subcommittee on Investigations hearings on Offshore Profit Shifting been examined the issue of corporate tax avoidance for the past few years, yet not much has been accomplished because of sentiments similar to those of Senator Coburn's, who wondered whether "it's too risky to tidy up the mess?" (referring to offshore profit shifting engaged in by multinational corporations). See Permanent Subcomm. on Investigations, Offshore Profit Shifting Memorandum, *supra* note 43. Furthermore, CEOs have been circumventing the issue by arguing that there will be no issue to worry about if the U.S. merely lowers its corporate rates. See 60 Minutes: The New Tax Havens (CBS television broadcast Mar. 26, 2011), available at: <http://www.cbsnews.com/video/watch/?id=7376848n> (reporting recent data showing that GE paid an effective rate of 3.6% in 2009 and quoting the Cisco CEO as stating that he would love to bring jobs back to the U.S., provided that the U.S. lowers its corporate tax rates).

⁵⁵ This is desirable because a society in which some taxpayers, such as multinational entities and highly skilled workers, receive tax breaks simply because they are more mobile while other, less mobile taxpayers, such as lower-skilled workers and consumers, are forced to shoulder a larger share of the tax burden, is highly inequitable. In this scenario "less desirable [also read mobile] individuals may include sick, elderly, and poor individuals." Dagan, *supra* note 50, at 65.

⁵⁶ Pragmatically, breaking down or otherwise defusing the competitive cycle among nations is politically challenging. Consider the extremely difficult political battles for tax revenue centralization within various countries alone, let alone on a global scale. See, e.g., Christina Wagner Faegri & Carol Wise, *Economic and Fiscal Policy in Latin America*, 46 LATIN AM. RES. REV. 240 (2011) ("The fiscal relationship between the provinces and the central government in Argentina stands out as the most complex and volatile [compared to other Latin American countries], and, despite several concrete attempts at centralizing tax revenue, a fiscal bargain similar to that of Mexico was never reached."); Kathryn James, *An Examination of Convergence and Resistance in Global Tax Reform Trends*, 11 THEORETICAL INQUIRIES LAW 475, 484 (2010) (discussing state and local reactions to the VAT in the U.S. and explaining that "state and local government representatives were concerned about the balance of federal taxing power and feared any intrusion into the sales tax area, which is dominated by state and local governments . . .").

measures have focused more on addressing what are known today as "tax havens" or "harmful tax practices," than on advancing broader integration or harmonization.⁵⁷ In 1998, the OECD established a special task force to counter the spread of abusive tax practices and to implement a code of conduct for business taxation.⁵⁸ Among other actions, the task force drafted an unofficial list of 35 jurisdictions deemed "uncooperative."⁵⁹ The OECD threatened to include these jurisdictions on a "black list," pledging severe sanctions if they refused to commit to several steps including a tax transparency and information exchange program.⁶⁰ As early as 2008, all but three jurisdictions complied with the OECD task force demands,⁶¹ with none remaining on the list by 2009.⁶²

⁵⁷ While not without its flaws, the OECD's 1998 initiative played an important role in forming international tax relationships for the past decade and a half. See OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE (1998), available at <http://www.oecd.org/tax/transparency/44430243.pdf>; OECD, 2000 PROGRESS REPORT: TOWARDS GLOBAL TAX CO-OPERATION: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES (2000), available at <http://www.oecd.org/ctp/harmful/2090192.pdf>; OECD, THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: 2004 PROGRESS REPORT (2004), available at <http://www.oecd.org/ctp/harmful/30901115.pdf>; OECD, THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: 2006 UPDATE ON PROGRESS IN MEMBER COUNTRIES (2006), available at <http://www.oecd.org/ctp/harmful/37446434.pdf>.

⁵⁸ OECD, HARMFUL TAX COMPETITION, *supra* note 57, at 8 ("The Report is intended to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally. Such harmful tax competition diminishes global welfare and undermines taxpayer confidence in the integrity of tax systems . . . By discouraging the spread of tax havens and harmful preferential tax regimes and encouraging those countries which presently engage in harmful tax practices to review their existing measures, the Report will serve to strengthen and to improve tax policies internationally.").

⁵⁹ Avi-Yonah, *supra* note 31, at 784–85 (explaining that the list of uncooperative jurisdictions was drafted based on the 1998 OECD report on Harmful Tax Competition as well as a second report, published in 2000, titled "Improving Access to Bank Information for Tax Purposes").

⁶⁰ *Id.* at 785–87. Among other relevant steps, the OECD Global Forum on tax information exchange was established in 2001 and in 2002 the OECD issued a model Agreement on Exchange of Information Issues. *Id.* at 786.

⁶¹ *Id.*

⁶² See *List of Unco-operative Tax Havens*, OECD, <http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm> (last visited May 7, 2014) ("In a report issued in 2000, the OECD identified a number of jurisdictions as tax havens according to criteria it had established. Between 2000 and April 2002, 31 jurisdictions made formal commitments to implement the OECD's standards of transparency and exchange of information. Seven jurisdictions (Andorra, The Principality of Liechtenstein, Liberia, The Principality of Monaco, The Republic of the Marshall Islands, The Republic of Nauru and The Republic of Vanuatu) did not make commitments to transparency and exchange of information at that time and were identified in April 2002 by the OECD's Committee on Fiscal Affairs as unco-operative tax havens. All of these jurisdictions subsequently made commitments and were removed from the list of unco-operative tax havens. . . . In May 2009, the Committee on Fiscal Affairs decided to remove all three remaining jurisdictions (Andorra, the Principality of Liechtenstein and the Principality of Monaco) from the list of uncooperative tax havens in the light of their commitments to implement the OECD standards of transparency and effective exchange of information and the timetable they set for the implementation. As a result, no jurisdiction is currently listed as an unco-operative tax haven by the Committee on Fiscal Affairs."). See also OECD, BETTER POLICIES FOR DEVELOPMENT: RECOMMENDATIONS FOR POLICY COHERENCE 25 (2011), available at <http://www.oecd.org/pcd/48110465.pdf> ("The economic crisis and recent cross-border tax evasion scandals have heightened the political drive to ensure rapid implementation of the OECD's tax transparency and information exchange standards, through the OECD-hosted Global Forum. . . . More than 600 agreements have been signed since April 2009 and many more are under negotiation.").

The emphasis on tax havens and harmful tax practices is not self-evident and has in fact drawn harsh criticism over the years. Some critics have doubted the actual success of the OECD initiative⁶³ while others have viewed it as a smoke screen fashioned to target a politically safe problem in order to avoid more difficult conversations about fundamental tax reform.⁶⁴ According to this proposition, the OECD initiative "may . . . be seen, at best, as a modest and inadequate effort to counter declining national revenues, and perhaps as an issue around which countries can choose to coalesce in order to create a basis for further cooperation on tax policy matters."⁶⁵

Likewise, harmonization efforts have also received their share of scrutiny. Specifically, given the distinctive characteristics of nations and the importance of national sovereignty, autonomy and self-expression, the efficiency advantage of harmonization, and its merit more generally, have become widely disputed.⁶⁶ Vito Tanzi, for example, cautions that "[we] need[] to be very careful with harmonisation, because harmonisation can take place around the most burdensome tax system of the group of countries or can take place around a tax system that is so inefficient that the inefficiencies

⁶³ See, e.g., Jason C. Sharman, *HAVENS IN A STORM, THE STRUGGLE FOR GLOBAL TAX REGULATION* (2006) (suggesting that the reduction in the OECD black list was more attributed to the U.S. withdrawal of support in 2001 than to actual progress in international cooperation). See also David Spancer & Jason C. Sharman, *International Tax Cooperation*, JOURNAL OF INTERNATIONAL TAXATION 35 (2007); David Spancer & Jason C. Sharman, *International Tax Cooperation*, JOURNAL OF INTERNATIONAL TAXATION 27 (2008); David Spancer & Jason C. Sharman, *International Tax Cooperation*, JOURNAL OF INTERNATIONAL TAXATION 39 (2008) (finding that little progress has been made in reducing tax havens practices). But cf. Avi-Yonah, *supra* note 31 (concluding that the OECD efforts have been successful based on data that suggests no decline in individual or corporate tax revenues in OECD member countries over the decade proceeding the 1998 initiative while showing a decline in corporate tax revenues in non-OECD countries over the same period).

⁶⁴ Allison Christians, *Taxation in the Time of Crisis: Policy Leadership from the OECD to the G20*, 5 NW. J. L. & SOC. POL'Y 19, 28 (2010) (discussing the G20 and explaining that "[T]hese troublesome factors raise difficult questions about the G20's focus on tax havens, especially since there is no indication offered to date that the elimination of tax havens is a top priority for developing countries. Instead, the G20's attention to global tax policy appears to be an effort to both attain a greater international acceptance of tax policy priorities articulated by the OECD and to avoid a more politically difficult conversation about the increasing incapacity of national tax systems to meet revenue demands, especially in times of economic instability.").

⁶⁵ *Id.* at 28. The OECD task force was also criticized for ignoring tax haven-like behavior in many countries, including the U.S. See, e.g., JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, *TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION* 6 (2013), available at <http://www.fas.org/sgp/crs/misc/R40623.pdf> (questioning the credibility and motivation behind the OECD "black list"); Allison Christians, *Sovereignty Taxation and Social Contract*, 18 MINN. J. INT'L L. 99, 119 (2009) ("What the OECD calls 'encouraging' and 'assisting' is interpreted by some as an unjustified use of force purely for self-interested ends."). Furthermore, the political feasibility of the OECD's ending all competitive activities is low. See discussion on globalization and tax competition in *supra* notes 26–28 and accompanying text as well as *infra* notes 86–90 and accompanying text.

⁶⁶ See, e.g., Richard E. Baldwin & Paul Krugman, *Agglomeration, Integrations, and Tax Harmonization*, 48 EUR. ECON. REV. 1, 21 (2004); Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2003); Carl Gaigne & Stephane Riou, *Globalization, Asymmetric Tax Competition, and Fiscal Equalization*, 9 J. PUB. ECON. THEORY 910, 920 (2007); Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357 (2001); Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 GEO. L.J. 543 (2001). Dean, for example, questions the emphasis on tax harmonization as the solution for nations to avoid international tax conflicts by becoming more alike. See Steven Dean, *More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime*, 84 TUL. L. REV. 125, 128–29 (2009). He subsequently makes a case for deharmonization—cooperation without uniformity—as a viable alternative. *Id.*

of one country are passed on to all the other countries."⁶⁷ Addressing the broader implications of harmonization, other scholars have questioned the legitimacy of the OECD to set the tone, serve as an authority, and lead worldwide initiatives "when OECD member countries represent a declining share of global gross domestic product."⁶⁸

Finally, although addressing tax competition has become a high priority in an increasingly globalized world, efforts by individual countries to strengthen tax administration are no less important.⁶⁹ Such efforts, however, remain largely unrealized, resulting in significant revenue loss. Senator Levin, for example, estimates that \$4 million per day is lost due to U.S. corporate tax avoidance,⁷⁰ while Gravelle puts the figure at \$10 to \$60 billion per year.⁷¹

IV. TRENDS OF CONVERGENCE AND DIVERGENCE IN AN INTERDEPENDENT WORLD

As nations draw closer—either intentionally or unintentionally—toward an all-inclusive, homogenous world, globalization can be understood to lead inevitably to convergence of national identities and policies.⁷² In this light, globalization is complemented by a unified approach to taxation that transcends national boundaries and jurisdictions.⁷³ The area of corporate taxation is a good example of such convergence.

⁶⁷ Tanzi, *supra* note 25, at 10 (adding that: "Therefore fiscal harmonisation has to be considered carefully.").

⁶⁸ Christians, *supra* note 64, at 33–34.

⁶⁹ For an interesting discussion that considers tax administration an integral part of nations' tax mix, see generally Dean, *supra* note 66. See also Assaf Likhovski, *Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandatory Palestine*, 11 THEORETICAL INQUIRIES LAW 725 (2010) (exploring history pre- and post-enactment of Britain's model Income Tax Ordinance in Palestine after World War II and highlighting the key role tax administrations played in that context). Likhovski explains that many discretionary compromises were made in adapting the income tax, for example in the treatment of tax evasion. *Id.* at 757.

In the report for 1942–43, the Commissioner noted that evasion was fairly widespread, but "having regard to the fact that income tax has been but recently introduced in Palestine, it was decided, as a matter of policy, not to take any action [by imposing] . . . penalties for the making of incorrect returns and fraudulent acts." *Id.*

⁷⁰ See 159 CONG. REC. S6658 (daily ed. Sept. 19, 2013) (statement of Sen. Levin). For an informative discussion of corporate tax avoidance estimates, see, e.g., *Senate Floor Statement on Introducing the Stop Tax Haven Abuse Act*, SEN. CARL LEVIN (Sept. 19, 2013), available at <http://www.levin.senate.gov/newsroom/speeches/speech/senate-floor-statement-on-introducing-the-stop-tax-haven-abuse-act>.

⁷¹ GRAVELLE, *supra* note 65, at 16–19 (discussing empirical literature and indicating that estimates on the revenue loss caused by corporate tax avoidance significantly vary). Gravelle also includes tables showing the percentage of U.S. profits as a percentage of foreign GDP. *Id.* at 14–15. For example, in Bermuda, such profits amounted to an astounding 646% of the country's GDP in 2008, indicating that "profits [were not derived] from economic motives related to productive inputs or markets, but rather reflect income easily transferred to low-tax jurisdictions." *Id.* at 15.

⁷² See, e.g., James, *supra* note 56, at 475 ("Notwithstanding a wide divergence in government and institutional structures, electoral systems, and social political values, there has often been a convergence of tax systems in Western democracies."); OECD, *supra* note 35, at 3 ("[D]espite there being 34 countries in the OECD, trends in tax rates and burdens show more common themes than differences.").

⁷³ See, e.g., REUVEN S. AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME 1* (2007) ("[A] coherent international tax regime exists, embodied in both the tax treaty network and in domestic laws, and that it forms a significant part of international law . . . The practical implication is that countries are not free to adopt any international tax rules they please, but rather operate in the context of the regime, which changes in the same way international law changes over time. Thus, unilateral action is possible, but is also restricted, and countries are generally reluctant to take unilateral actions that violate the basic norms that underlie the regime.").

As Avi-Yonah, Sartori, and Marian show, since the mid-1980s and well into the 2000s, most industrialized nations have been implementing very similar reforms to broaden their corporate tax bases.⁷⁴ These commonly include (1) eliminating or significantly reducing investment credits; (2) replacing generous accelerated depreciations with depreciation rules that more closely reflect the life of assets; and (3) introducing limitations on interest deductions.⁷⁵

A degree of convergence is not surprising in the context of income taxation because the structural considerations factored into the design and administration of income tax systems tend to be similar across jurisdictions.⁷⁶ Similarities exist not because there are no differences among nations, but because globalization significantly levels the playing field.⁷⁷ Stated differently, given the effect of globalization across countries, convergence emerges as a natural phenomenon as cooperative strategies prove beneficial and markets open toward one another.⁷⁸ In fact, functional comparatists commonly argue that convergence is not only an easily observed phenomenon, but also a desirable practice.⁷⁹ It is viewed as beneficial because "there is little sense in adopting different legal rules that are aimed at dealing with similar . . . problems and to achieve similar results."⁸⁰ Accordingly, the seeming heterogeneity across countries—whether in taxation or otherwise—may merely disguise innate similarities.⁸¹

Importantly, despite the forces working toward convergence, an absolute convergence of tax systems driven by a dramatic "race to the bottom" of tax rates and bases remains unlikely.⁸² Several domestic factors, such as the size of public sector debt, act as counterweights to tax competition.⁸³ In addition, attracting economic resources requires more than offering preferential tax treatment. In a statement on International Tax Issues before the Ways and Means Committee of the U.S. House of Representatives, Jane Gravelle observed that "most [U.S.] stocks held in foreign firms are in firms in developed countries with similar tax rates to those of the U.S., *not* firms in low tax

⁷⁴ AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 113–14, 142–43.

⁷⁵ *Id.*

⁷⁶ See *supra* note 11, and accompanying text.

⁷⁷ See, e.g., Robert T. Kudrle, *Governing Economic Globalization: The Pioneering Experience of the OECD*, 46 J. WORLD TRADE 695 (2012) (explaining that "[e]conomic globalization demands national policy accommodation"); cf. Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155, 160–61 (2008) (suggesting that "a sovereign state must exhibit some de facto external independence," but that, at the same time, it is "never a truly absolute quality").

⁷⁸ See Avi-Yonah, *supra* note 18, and accompanying text.

⁷⁹ AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 4–5 (discussing the functionalist approach to taxation and analyzing Carlo Garbarino's scholarship as a good example of a functionalist tax analysis).

⁸⁰ *Id.*

⁸¹ AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 4. The OECD's model for international transfer pricing standards is another example of a legal standard adopted across different jurisdictions (albeit with differences in its administration), because

[t]he incomplete and inconsistent application of international standards, inadequate legislation, or a lack of basic tax capacity in developing countries can mean that transfer prices used by MNEs may depart from the arm's length standard and lead to profits being shifted to low-tax jurisdictions, resulting in a lower revenue for normal rate jurisdictions, including developing countries.

OECD, BETTER POLICIES FOR DEVELOPMENT, *supra* note 62, at 25.

⁸² AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 139–40 (indicating, for example, a trend of corporate rate divergence over the past decade). See also *supra* note 36.

⁸³ AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 139 (citing Duane Swank & Steven Steinmo, *The New Political Economy of Taxation in Advanced Capitalistic Democracies*, 46 AM. J. POL. SCI. 642 (2002)).

countries."⁸⁴ To the extent that these firms keep their investments in the developed world, such evidence counters the common assumption that tax rates are the sole or even predominant factor in determining investment decisions. Rather, investments are more likely to be made based on a mix of considerations, including the availability and quality of local goods and services, which can be severely undermined by declining revenues if countries excessively indulge in preferential tax offerings.⁸⁵

Furthermore, notwithstanding the homogenizing influence of convergence, globalization may also lead to divergence as nations find it beneficial to draw on their individual strengths to gain competitive advantages.⁸⁶ In fact, the undertone of most comparative tax analyses continues to demonstrate that "the most obvious finding is divergence"⁸⁷ and that, so far, "convergence is a relatively narrow phenomenon . . . limited to certain aspects of the tax system, primarily its corporate and international provisions."⁸⁸ Notably, in any jurisdiction law is but one piece of a broader cultural puzzle, which draws on unique local conditions. The assertion that structural tax problems and solutions across different jurisdictions are similar can therefore be seen as both inaccurate and misleading.⁸⁹ On this view, "harmonization projects . . . that call—by definition—for the annulment of cultural identity as expressed in the unique laws of a given society . . . [may not only be rejected as undesirable but could also present] an unattainable goal, since cultural and political differences are irreconcilable."⁹⁰

As Kathryn James explains, taxation is "fundamentally about the rules of the game that determine, amongst other things, the level of social spending in society, the distribution of property among social groups, and the concentration of power"⁹¹

⁸⁴ *Hearing on the Need for Comprehensive Tax Reform to Help American Companies Compete in the Global Market and Create Jobs for American Workers*, *supra* note 28, at 6 (statement of Jane Gravelle) (emphasis added).

⁸⁵ *Id.* (emphasizing that "portfolio investors are concerned with the overall return (governed by overall tax rules) and not the details of a country's foreign tax regime"); cf. AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 140 (discussing FDI in the context of MNEs' activity and citing Joshua D. Moore, *The Economic Importance of Tax Competition for Foreign Direct Investment: An Analysis of International Corporate Tax Harmonization Proposals and Lessons from Winning Corporate Tax Strategy in Ireland*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 345, 357 (2007) ("[B]ecause MNEs benefit from tax expenditures and provisions of public goods and services, they are unlikely to derive the rates to zero.")).

⁸⁶ See, e.g., James, *supra* note 56, at 496 ("The mere fact that VAT reform was so controversial in Australia and Canada and remains elusive in the U.S. challenges this presumption of necessary convergence.").

⁸⁷ Avi-Yonah, *supra* note 18, at 1 ("If one compares any two national tax laws, the most obvious finding is divergence. Tax law reflects specific national histories, cultures and interests, and not surprisingly they differ.").

⁸⁸ *Id.* at 5. In these areas, convergence may be a positive phenomenon to the extent that it reduces the scope of tax arbitrage where taxpayers manipulate the discrepancies among tax systems of different jurisdictions to minimize their tax liability. *Id.*

⁸⁹ AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 7; Marian, *supra* note 2, at 465 ("Tax law is very much *about* local context. It is the very essence of the political orientation of any regime in any given jurisdiction . . . [and] is used expressly to promote political agendas.").

⁹⁰ AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 7 (adding that "rather, . . . comparative analysis should be aimed at *understanding* the cultural; social; political; and ultimately, the legal identities of 'the other.' In turn, such 'understanding' should serve us better 'when reflecting on our own legal rules and cultural identity.'"); Likhovski, *supra* note 69, at 761 ("Many participants in the debate about legal transplantation and the autonomy of the law assume that law is autonomous and independent of the society which it governs or, alternatively, that it reflects that society. But in fact law is both autonomous *and* related to society, depending on the specific phase in the life of the law that we are examining and the actors we are interested in.").

⁹¹ James, *supra* note 56, at 496.

While "these issues might be universal . . . there are clear differences as well as similarities in the way in which societies respond to [them]" ⁹² In this light, divergence is both to be expected and valuable. ⁹³ As long as there are differences among societies, convergence will never be complete. ⁹⁴

In fact, forces of convergence and divergence may operate at the same time, pulling nations in opposite directions and at times—either partially or completely—negating each other. Comparing the Canadian General Anti-Avoidance Rule (GAAR) with its Chinese counterpart, Jinyan Li argues, for example, that even though both GAARs appear similar on paper, they diverge in several fundamental respects, including the challenges addressed, the motivations behind their enactment, and their application and effects. Li adds, however, that because the Canadian and Chinese GAARs affect their tax systems from almost opposite directions, they end up bringing the two systems closer together. ⁹⁵

Ultimately, the existing literature suggests that the likely, particularly long-term, outcomes of globalization, even tax competition, are unclear. ⁹⁶ The ability of capital to move where it can be used most productively can enhance the growth and efficiency of local markets. ⁹⁷ Additionally, while any downward or regressive pressures on the tax base and rates are expected to adversely affect public outlays, another trend is likely to work in the opposite direction, stimulating increased public spending on local infrastructures to manage the upshots of modernization and global competition. ⁹⁸ These

⁹² *Id.*

⁹³ Avi-Yonah, *supra* note 18, at 1–5 (discussing elements of convergence and divergence in taxation).

⁹⁴ See, e.g., AVI-YONAH, SARTORI, & MARIAN, *supra* note 1, at 7–9; cf. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002) (exploring convergence and divergence in the common and civil law).

⁹⁵ Li, *supra* note 13, at 658; James, *supra* note 56, at 495–96 ("[W]hile consumption tax reform in Australia, Canada and the United States was, and remains, highly controversial, these controversies are often the product of different configurations of key political and economic factors, which pull in competing directions towards convergence and divergence in tax reform outcomes."). James adds, more generally, that "[t]he VAT-reform experience of . . . [Australia, Canada, and the United States] encapsulates the tension that arises from a tendency among developed tax systems to convergence against frequent and often fierce localized opposition." *Id.* at 475; Likhovski, *supra* note 69, at 761 (discussing the simultaneous convergence and divergence that occurred in implementing the Palestinian income tax). Likhovski concludes that "[u]ltimately what we are left with is a confusing picture, which is the result of opposing forces, each pulling in a different direction." *Id.*

⁹⁶ For a good explanation on why globalization and tax competition theories offer conflicting results, consider Eric Toder's remarks on tax incentives and behavior: "Correlation between two variables does not imply that one change causes the other and there are usually many aspects of a taxpayer's situation that are changing at the same time, confounding attempts to identify the separate effect of the incentive being studied." *Responses to Tax Incentives in a Complex and Uncertain Law Before the Senate Fin. Comm.*, 112th Cong. 7 (2011) (statement of Eric Toder, Fellow at Urban-Brookings Tax Policy Ctr.).

⁹⁷ See, e.g., CHRIS EDWARDS & DANIEL L. MITCHELL, *GLOBAL TAX REVOLUTION: THE RISE OF TAX COMPETITION AND THE BATTLE TO DEFEND IT* (2008); Tanzi, *supra* note 25; cf. Avi-Yonah, *supra* note 27, at 1614 ("A fundamental assumption of the studies [suggesting that tax competition impairs the ability of nations to best service the needs of their citizens] is that governments are benevolent—that they seek to maximize the utility of their residents. However, governments may also be considered Leviathans that seek to maximize their revenues in their own self-interest without regard for the good of the general citizenry. From this perspective, tax competition may be beneficial because it constrains governments' tendency to grow.").

⁹⁸ Vito Tanzi, *Globalization and the Need for Fiscal Reform in Developing Countries*, 26 J. POL. MODELING 525 (2004); Hines & Summers, *supra* note 19, at 124 ("[T]he economic costs of raising tax revenue are particularly worrisome in an environment in which governments face significant demands on

include, for example, additional funding needed for tackling increasing rates of inequality⁹⁹ and the rise in longevity and in the cost of public goods and services.¹⁰⁰ Furthermore, economic activity, including investments and other productive endeavors, is likely to be pursued where it is most profitable. Profitability, however, relies heavily on the availability and quality of national infrastructures, such as law enforcement and the monetary system, which, in turn, depend on taxation.¹⁰¹

The evidence on the effect of globalization on public expenditure, however, is yet again inconclusive.¹⁰² Likewise, as *Global Perspectives on Income Taxation Law* illustrates, while globalization may lead to at least some observed trends in taxation—including the flattening of income tax rates and the move toward the taxation of less mobile sources, and thus more regressive, tax schemes—there is clearly far more than meets the eye. Here, *Global Perspectives on Income Taxation Law* provides a valuable reference for how different countries confront challenges that are common among tax systems. Keeping in mind that differences among national tax systems nonetheless exist and understanding how tax systems converge and diverge constitutes a vital first step toward crystallizing the necessary actions to better coordinate between multiple tax systems while retaining national sovereignty in tax design. Over the long run, this could also lead to better evaluation of the net benefit or cost of globalization, allowing policymakers to respond effectively to the fiscal challenges that globalization presents.

their resources . . . [these demands] put pressures on government to . . . respond in ways that help their populations thrive in more global competitive markets. Social welfare programs have for many years served the first of these functions and education and training programs the second; all of these are expensive, so there is understandable interest in the ability of government to maintain their funding . . ."). However, "since location choices, activity levels, and taxable incomes are sensitive to local taxes, it stands to reason that governments would feel intensifying pressure to reduce tax burdens on business activities, investors, and possibly high net worth individuals." *Id.*

⁹⁹ IMF, *supra* note 39, at 10 (explaining that while there is evidence to suggest that increased inequality may be caused more by technological changes than globalization and the related expansion of the VAT, governments are likely to be called upon to assist those who are adversely affected, and particularly to provide more income support and training for low-skilled workers who lose their jobs as the flow of trade increases); Robert C. Feenstra & Gordon H. Hanson, *Global Production Sharing and Raising Inequality: A Survey of Trade and Wages*, in 1 HANDBOOK OF INTERNATIONAL TRADE 146 (E. Kwan Chio & James Harrington eds., 2004) (reviewing evidence suggesting that globalization has contributed significantly to income inequality).

¹⁰⁰ See, e.g., Brooks & Wong, *supra* note 18, at 800–01 (explaining, for example, that "somewhat paradoxically, globalization itself increases the need for taxation because it increases the instability of economies and the economic insecurity of workers; this in turn should lead to an increased demand for social insurance schemes").

¹⁰¹ Kenneth Stewart & Michael Webb, *International Competition in Corporate Taxation: Evidence from the OECD Time Series*, 45 ECONOMIC POLICY 153 (2006) (discussing business activity).

¹⁰² Some studies suggest, for example, that increased trade openness may stimulate higher government spending, but that increased trade openness combined with financial globalization leads to lower government spending. IMF, *supra* note 39, at 10 (citing literature). According to the IMF:

While these results are not necessarily inconsistent . . . they do not provide definitive conclusions one way or the other on the implementation for spending. Moreover, they are only partial in that they tend to focus on central government expenditure . . . which is a problem to the extent that globalization leads central governments to make room for new spending by offloading responsibility for some existing programs onto local government.

Id. at 10–11.